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In The

Supreme Court of the United States

October Term, 1989

JOHN POZSGAI,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION AND LAND IMPROVEMENT CONTRACTORS OF AMERICA IN SUPPORT OF PETITIONER

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Mountain States Legal Foundation (MSLF) and the Land Improvement Contractors of America (LICA) respectfully submit this brief *amici curiae* in support of Mr. John Pozsgai, the Petitioner for *certiorari*.[1]

[1] *Amici* have obtained the written consent of the parties to the action below, pursuant to Rule 37.2 of the Supreme Court Rules. The letters communicating such written consent have been filed with the Clerk of the Court.

INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. Mountain States Legal Foundation has an extensive background and expertise in environmental law. The nearly 3,000 members of Mountain States Legal Foundation – from every state in the Union – are vitally interested in ensuring the protection of private property from unnecessary and excessive regulation by the U.S. Government.

The Land Improvement Contractors of America, headquartered in Maywood, Illinois, has been involved in educating contractors and landowners in soil and water conservation techniques and practices for the last forty years. LICA has a total of 5000 members residing in all states, with chapters in forty states, and sister organizations in Australia, Canada and New Zealand. LICA represents people who either own real property or are employed by owners of real properties. Such property includes land that the U.S. Department of the Army, Corps of Engineers deems to be "wetlands." LICA provides a wide range of services to its members, including the dissemination of information and consultations relating to the protection of their legal rights.

STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW REPRESENTS A GROSS MISCARRIAGE OF JUSTICE, REPRESENTS A MASSIVE EROSION OF STATUTORY AND COMMON LAW PRINCIPLES, AND IS UNDULY HARSH IN ITS IMPACT.

The Environmental Protection Agency (EPA) and the U.S. Department of the Army, Corps of Engineers (Corps) have applied the so-called "dredge and fill" permit provisions of Section 404 of the Clean Water Act in such a manner as to transform the Clean Water Act into a wetlands protection statute. Without benefit of Congressional action – without benefit of months, if not of years, of hearings, debate, and careful consideration and deliberation regarding legislative proposals – the Executive Branch has written and is in the process of implementing its own "Wetlands Protection Act." By their actions, the EPA and the Corps have subverted the doctrine of Separation of Powers and the Founding Fathers' carefully crafted system of checks and balances. By its "wetlands policy," the Executive Branch has "enacted" and is now in the process of implementing "the law."

Recently the Executive Branch has embarked upon an aggressive program of imposing harsh, almost confiscatory civil and criminal penalties on its citizens. Americans pursuing otherwise legal business enterprises, have found themselves caught in a maze of regulatory

demands totally unconnected with the preservation of water quality. In the name of "wetlands protection," the Executive Branch has implemented an aggressive campaign against American farmers, ranchers and business people. One such campaign involves Petitioner, John Pozsgai.

In adopting the Clean Water Act Congress sought to "restore and maintain the chemical, physical, and biological integrity of the Nation's *waters*."[2] In its deliberations regarding the Clean Water Act, the Senate Committee on Public Works concluded that "Water moves in hydrologic cycles and it is essential that *discharge of pollutants* be controlled at the source."[3]

On the floor of the U.S. House of Representatives, Congressman John Dingell, a member of the Conference Committee which crafted the version of the legislative proposal which became law, stated that " . . . this new definition [of water] clearly encompasses all water bodies . . . *for water quality purposes*."[4]

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[2] 33 U.S.C. § 1251. (Emphasis added.)

[3] 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1495. (Emphasis added.)

[4] 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 250. (Emphasis added.)

It is clear even from this cursory examination of the legislative history of the Clean Water Act that Congress sought to protect water quality not to ensure the existence of "wetlands."

Section 402 is the backbone of the Clean Water Act. As administered by EPA, it limits the types and amounts of discharge that can be released into our nation's waters.[5] Section 404 is an adjunct to this primary enforcement tool and is administered by the Corps not by EPA. It regulates, but does not necessarily prohibit, the discharge of fill materials into "navigable waters."[6] It is this latter program that has been the primary tool of the Executive Branch, not to protect the quality of our nation's "waters," but to preserve "wetlands" by preventing the placement of clean fill on private property which the Corps of Engineers considers to be "wetlands."

The Government asserts that preservation of "wetlands" is necessary to enhance water quality. Even if the Clean Water Act provided the Executive Branch the requisite authority to "enhance" water quality – rather than to prevent degradation of water quality – by prohibiting actions taken on private property, that objective has long since become lost in the Corps of Engineers' regulatory program. That is, the Executive Branch does not now seek to preserve wetlands because proposed activities involving the wetlands would degrade water quality, but simply to preserve wetlands for whatever aesthetic and

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[5] 33 U.S.C. §1342.

[6] 33 U.S.C. §1344.

intrinsic value such wetlands may possess.[7] Thus, the Corps of Engineers' Section 404 program, which originally regulated the placement of fill on wetlands as a *means* of preventing the degradation of our nation's water quality, has become the *end* by preventing the placement of any fill on "wetlands."

In the case of Petitioner, John Pozsgai, there was absolutely no degradation of the quality of the water in the tiny stream that runs adjacent to his property. In fact, the quality of the water appears to have been enhanced as a result of Petitioner's activities. This is especially the case since Petitioner removed thousands of old tires and other junk that had been discarded in the area over several decades preceding his purchase of the property. *See,* Petition for Writ of Certiorari at 4.

When a particular wetland has little, if any, value for preventing degradation of or enhancing water quality, one would expect the Corps to permit a property owner to improve his or her property by the placement of fill

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[7] To the contrary, studies discussed by the Office of Technology Assessment demonstrate that some wetlands may even degrade water quality instead of enhancing it. The Valiela study, a 1975 Massachusetts experiment, showed a 20% increase in the amount of nitrogen, a pollutant, which exited a marshland over the amount which entered the marsh. The Crisp study, conducted in 1966 in Britain, measured the net export of nitrogen and phosphorus, both recognized as pollutants, from a British peat bog – unquestionably "wetlands." The study showed a remarkable 552% increase in the amount of these pollutants exiting the peat bog over the amount entering it. *See,* Office of Technology Assessment, Congress of the United States, *OTA-2-206, Wetlands: Their Use and Regulation* (1984) ("Wetlands").

materials on "wetlands." In fact, the Corps has established the so-called Nationwide Permit program which allows *de minimis* fill of "wetlands."[8]

While the Nationwide Permit program issue is not directly before this Honorable Court, it nevertheless demonstrates both the outer edges of the Corps' jurisdiction in cases such as this, and how far afield Petitioner's conduct is from the activity which the Corps is to prevent, that is "water pollution." Under these circumstances, this Honorable Court should not allow Petitioner's harsh punishment of twenty-seven months in prison – the longest in U.S. history for any environmental offender and $200,000 fine – to go unreviewed.

The Government attempts to justify its punishment of Petitioner by claiming that there is a "conversion" of approximately 300,000 acres of wetlands per year. However, approximately 250,000 of these acres are lands which lie outside the Section 404 permitting process.[9] Thus, the vast majority of alleged wetland "conversions" are the result of lawful activities not covered by the Section 404 program, such as excavation, drainage, clearing, and the flooding of wetlands.[10] Furthermore, of the approximately 11,000 project applications filed each year under the Section 404 permitting process, less than

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[8] In fact it appears that the activities of Mr. Pozsgai met the requirements of the Nationwide Permit program since he placed fill materials on less than ten acres of his property. *See* 33 C.F.R. §330.5(a)(26).

[9] *Wetlands*, at 141.

[10] *Wetlands*, at 15.

three percent are denied.[11] In addition, other factors which affect our Nation's net loss of wetlands, including mother nature herself, account for approximately ten percent of wetland "conversion."

In any event, the figures used by the Government on alleged wetlands loss are approximately a decade old. Today valuable wetlands are already protected, especially by state laws expressly designed to protect and preserve wetlands. Thus, the loss of wetlands are certainly not attributable to the conduct of individuals like Petitioner, John Pozsgai.

Petitioner was charged with and convicted of discharging certain pollutants into certain navigable waters of the United States.[12] In this particular instance, Petitioner did not run afoul of the law as much as he ran afoul of a novel interpretation by the Corps of the term "pollutant." The expansive nature of the Corps definition of "wetlands," apparently permits it to conclude that portions of Petitioner's property constitute "navigable waters" and thus "waters of the United States."[13] However, the definition of "pollutant," requires unequivocally that the pollutant be discharged "into water."[14] Further, "water," is not defined by the statute and implementing regulations as anything other than "water." Thus, the definition of "water" cannot be expanded to include such broad terms as "waters of the United States,"

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[11] *Wetlands*, at 141.

[12] 33 U.S.C. §1319(c)(1).

[13] 33 U.S.C. §1362(7).

[14] 33 U.S.C. §1362(6).

"navigable waters," "wetlands," "inundated areas," "swamps," "marshes," or even "bogs."

Thus even if the definition of "wetlands" is expanded beyond all reason to include Petitioner's property – whose only relationship to "wetlands" is its proximity to a "trickle" that can hardly be called a "stream" – such an expansive definition cannot be used to assert that Petitioner, by placing fill on his property, was depositing that fill "into water." There is absolutely no question that Petitioner placed the fill on land, and not "into water."

Indeed, in its brief to the Third Circuit Court of Appeals, the Government was unable to set forth any legislative history or any case law to support the proposition that Congress intended a "pollutant" to be that which is discharged somewhere other than "into water." While the Government cited numerous cases addressing the definition of "pollutant" in the Clean Water Act, all of these cases recite the litany of materials described in the definition. None address the requirement that for the activity to fall within that which Congress prohibited the "pollutant" must be discharged "into water."

The definition of "pollutant" found in the Clean Water Act, and its specific use of the term "into water," is an important question of law which this Honorable Court should consider. Case law cited by the Government fails to provide the authority and support which the Government must have to have proceeded against Petitioner.[15]

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[15] *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922-925 (5th Cir. 1983); *United States v. Bradshaw*, 541 F. Supp.

(Continued on following page)

II. THE DECISION BELOW REPRESENTS A REAL AND INTOLERABLE CONFLICT WITH A DECISION OF THIS HONORABLE COURT.

In *U.S. v. Riverside Bayview Homes*, this Honorable Court addressed only the authority of the Corps to regulate discharges of fill material into wetlands which are "adjacent to *bodies of open water.*"[16] This Honorable Court expressly reserved judgment as to the ability of the Corps to regulate wetlands *not* adjacent to bodies of open water. *Id.* The instant petition brings before this Honorable Court the issue of the extent to which the Corps may regulate "wetlands" not adjacent to bodies of open water.

As Judge Merritt aptly points out in his concurrence in *U.S. v. Larkins*, 852 F.2d 189, 193 (6th Cir. 1988), the Corps' definition has detached the "wetlands" jurisdiction of the Corps from any concept of open or navigable waters. As an example, Judge Merritt points to a farmer's low-lying farmland or a homeowner's low-lying backyard – adjacent to a small stream or creek but miles from any navigable waterway.

Judge Merritt raises a significant issue related to the case at bar by questioning the definition to be applied to the "bodies of open water" concept. Thus, is the test for determining the presence of a body of open water the

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880, 882-883 (D. Md. 1981); *United States v. Weisman*, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980); *United States v. Robinson*, 570 F. Supp. 1157, 1162-1163 (D. Fla. 1983).

[16] 474 U.S. 121, 131 n.8 (1985). (Emphasis added.)

same as the traditional navigability test? Or do bodies of open water include tiny intermittent streams or drainage ditches?

Petitioner's property is adjacent to a tiny stream which is hardly a "body of open water" and indeed is far removed from any river, bay, lake or similar body of open water. It is difficult to imagine how the Corps could attempt to assert jurisdiction over the activities of Petitioner. The petition should be granted.

CONCLUSION

The cruel, callous, and pitiless treatment of Petitioner by the United States Government is more than simply federal action far out of proportion to the violations alleged against him. The U.S. Government, without Congressional authority, has embarked upon a "wetlands preservation program" for which it has absolutely no authority. In fact, the interpretations of law which the U.S. Government requires to proceed against Petitioner run directly contrary, not only to the express language of statute, but to the legislative history accompanying that statute.

If John Pozsgai's petition is not granted, more than a great injustice will have been committed against a man who came to America from behind the Iron Curtain seeking liberty; the Executive Branch will have been granted the permission of this Honorable Court to make law, not simply to enforce it.

We urge this Honorable Court to grant the petition.

Respectfully submitted,

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